ORIGINAL

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Sylvester A. Danzl and
Marian M. Danzl

Plaintiffs and Appellees

vs.

Ron Baldinger

Defendant

and

Construction, Inc.,

Defendant and Appellant

Supreme Court No. 20020

District Court
Burleigh Co. Civil No.

Appeal From Amended Judgment
and from
Second Amended Findings of Fact, Conclusions of Law
and Order for Judgment
South Central Judicial District Court
Honorable Bruce B. Haskell Presiding

BRIEF FOR APPELLEES

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Marian M. Danzl
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Appellees

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STIPULATIONS

The Plaintiffs stipulate to the STATEMENT OF ISSUE on page one of Defendant's brief.

The Plaintiffs stipulate to the NATURE OF THE CASE on page two of Defendant's brief.

The Plaintiffs stipulate to the PROCEDURAL HISTORY on pages two, three, four and five of the Defendant's brief.

MOTIVATIONAL BACKGROUND FOR LITIGATION

The Plaintiffs, (Sylvester A.Danzl and Marian M. Danzl), entered into a contract for the replacement of the roof on their home with H & R Construction. The replacement estimate was for $3480 dollars and the bill was for $4186 dollars at the completion of the job on Sept. 11, 2001. After a conciliatory discussion about the bill, the plaintiffs paid H & R Construction $4186 dollars. The manufacturers Estimate of serviceability of the type of roof installed is approximately 25 years. Approximately a year later a light hailstorm rained on the roofafter which Mr. Danzl called his insurance company to check for damage.

The insurance claims adjuster informed the plaintiffs that the damage was due to faulty installation and such damage was not covered by his insurance. Mr. Danzl notified Mr. Heidinger. Mr Danzl proceeded to do a temporary repair to prevent peripheral damage. When Mr. Heidinger inspected the roof he admitted that the area where visible bumps, cracks and holes had manifested was improperly applied. Mr. Heidinger proposed solving the problem by repairing the area where visible damage had manifested itself.

The plaintiffs reasoned that it was unlikely that the applicators had an epiphany in the middle of the job and changed their method of application. That meant a partial fix would have to be repeated, area-by-area, square-by-square, or shingle -by-shingle as the faulty work-manship manifested itself in visible damage until the whole roof was replaced. In the meantime they would have to live with a roof of questionable serviceability and questionable insurability.

The plaintiffs rejected the solution as being unsatisfactory and tried to pursue a more satisfactory solution through conciliatory means. The plaintiffs were unable to contact Mr. Heidinger in several attempts and months went by without Mr. Heidinger giving attention to or offering a satisfactory solution to the problem, which was obviously his responsibility.

The plaintiffs are senior citizens and are not litigious people. When the cost of the roof was 23% over estimate, to the tune of $706, the plaintiffs didn't go to court to see if they were legally responsible for the bill. Neither did they drag H & R Construction through prolonged and expensive proceedings to collect the extra charges.

By January of 2003, the plaintiffs felt there was no other avenue of recourse than to engage the court system. The State provides a small claims court that is inexpensive and versatile enough in its protocol for presenting evidence and arguments that it is serviceable to average citizens, not learned in law or legal procedures. While the decisions in small claims court carry the weight of law the proceedings are more akin to a third party mediation with a qualified mediator. In January 2003, the plaintiffs filed a claim in small claims court against H & R Construction for damages.

The Defendant's "frivolous defense plea" in response to that claim created and sustained the issue now before this court.

LEGAL FOUNDATIONS AND ARGUMENTS

Foundation:

The claim filed by the plaintiffs fit all the criteria of a small claims court. The issues were simple, the facts were clear and uncomplicated and the dollar value was within State guidelines. District Judge Haskell expressed this on page 72, lines 21 and 22 of the court transcript.

Argument

The proper place for this claim to be heard was small claims court where there would have been neither need nor threat of impoverishment to the degree of thousands of dollars for either party except at their own discretion.

Foundation

On 23, 24 and25 on page 72 of the District Court transcript and continued on lines 1 and 2 of page 73 of the same document Judge Haskell articulated the seemingly apparent motive for movingthe action to District Court, thereby inviting the defendant's attorney to correct or replace that motive. The reply of Mr. Myerchin (defence attorney) is contained on lines 14, 15, 16 and 17 of the transcript.

Argument

First the defendant's attorney reveals that the defendant overruled the States criteria for what should be heard in small claims court.Secondly, Mr. Myerchin argues that the proposed solution of Mr. Heidinger would have solved the problem which was his responibility. The fact that Mr. Heidinger is an experienced and knowledgeable professional roof

contractor makes his claim that he was lacking in that the proposed solution was inadequate, inefficient and unacceptable as a solution to the problem is simply incredible. Nonetheless it could have been Evaluated in small claims court as well as in District Court.

Foundation:

On lines 18, 19 and 20 on page 73 of the transcript Judge Haskell asks why the above-mentioned arguments couldn't have been made in small claims court. On line 24 of page 73, Mr. Myerchin replies the defendant wanted an attorney to represent him. On line 2 of page 74 Mr. Myerchin states his client has not had success in court before. On lines 3,4,and 5 of page 74 of the transcript Judge Haskell asked the defendant's attorney if there was a reason the defendant couldn't have hired him and proceeded in small claims court without necessitating the plaintiffs to hire councel. On lines 7, and 8, page 74 of the transcript, Mr. Myerchin states, "my understanding is that lawyers aren't allowed to present arguments in small claims court."

Argument:

The first response of Mr. Myerchin was that the defendant wanted an attorney because he hasn't been successful in court before. If there is, there shouldn't be a court where anyone can avoid responsibility and liability by mounting a frivolous defense and be successful at it. There was no need to move to another court for that reason. Mr. Myerchin then claims it was necessary to go to a higher court so the defendant could avail himself of counsel. There is no foundation for this argument and it is incredible.

Foundation:

On lines 4 and 5, page 74 of the transcript, Judge Haskell mentions Mr. Danzl's feelings of necessity to hire a lawyer.

Argument:

Mr. Danzl's feelings are based on a reality alluded to by Mr. Myerchin on line 4, page 73 of the transcript, "even learned men don't go to court without a lawyer." Higher courts require proper procedure and protocol in presenting arguments and evidence. The soundest arguments and best evidence can be discarded as irrelevant or hearsay if not couched and presented in proper procedure and protocol.Lawyers are experienced and schooled in the procedures and protocols of courts. That is the foundation of their profession and it is necessary to have one in District Court if one expects their case to get a proper hearing. Lawyers are expensive and that is why frivolous pleadings have the power of intimidation and or coercion in the interest of deterring people from seeking the day in court they are entitled to. In the case at hand the plaintiffs fretted over the threat of possible impoverishment to the extent of litigation costs, even though the case was simple and uncomplicated and the liability was self-evident. It was a difficult decision to proceed in District Court but in the end it seemed necessary to do so.

Foundation:

It seems the answer to the issue at hand can be found in the statute

citation from lines 13 and 14 on page 72 of the District Court transcript. Mr. Myerchin pointed out chapter 28-6 (should be 28-26-01) and noted that costs can be awarded in frivolous filings. A frivolous filing is defined by Black's Law Dictionary as a filing "which at first glance can be seen to be merely pretensive, setting up some ground which cannot be sustained by argument." Mr. Myerchin appeared to be of the mind that a frivolous defense plea should be excluded from the discretionary right of the court judge to determine responsibility for costs. It doesn't take a very broad interpretation of the law to give defense filings and pleas the same standing when determining if they are to be handled as frivolous. In the cases of frivolous filings the awards go to the prevailing parties so the exception must apply to the filings of either party. It is important to remember here we are not arguing the defendants filing of a defense plea as being frivolous but only his filing of that plea in the more expensive setting of District Court instead of in the court where the original claim was filed.It was the filing in District Court that exemplified its frovolity. It is apparent that at first glance the court saw the shift to District Court to be pretensive. In subsequent proceedings the court gave the defense every opportunity possible to provide sound argument for filing their defense plea in District Court instead of in small claims court where the original claim was filed. The defense was unable to supply not only a sound argument but even a credible or plausible argument for filing their defense plea in the more expensive District Court. A filing of a claim is frivolous if it can be seen at first glance to

be merely pretensive, setting up some ground which cannot be sustained by sound argument.

Argument:

While the defendant had every right to defend the claim against him in court, by unnecessarily filing his defence plea in the more expensive setting of District Court without arguable grounds for doing so he created a frivolous defence which threatened the plaintiffs with impoverishment. Filing frivolous claims or pleas with a court is available to anyone but when it is exercised the filer is responsible for the costs at the discretion of the court. Such was the case in the issue being addressed here.

Foundation:

In Peterson vs. Zerr, 477 N. W. 2nd 230 (N.D. 1991) "An award of attorney's fees subsection (2) of this section [chapter 28-26-01] lies within the sound discretion of the trial court, and its determination will be disturbed only for an abuseof that discretion." [] Bracketed information added. Subsection (2) statesthat in civil actions the court shall, upon a finding that a claim for relief was frivolous, award reasonable actual and statutory costs, including reasonable attorneys fees to the prevailing party.

Argument

Subsection (2)'s reference to the prevailing party implies that the frivolous action applies to the defence and plaintiffs alike. While

Judge Haskell didn't cite the foundations for his procedure and judgement, in essence it fits all of the criteria of dealing with a frivolous defence and should be upheld as such.

Argument:

The defence has repeatedly disputed the standing of the term impoverishment. The term impoverishment does have standing. Our law system is based on the reasonable man theory. Logic is an important component of reasoning. According to the rules of logic, when a negative is inserted in a declarative sentence the term it refers to attaches itself to its adverse connotation or connotations.The statement thou shalt not enrich yourself at anothers expense logically infers thou shalt not impoverish another for your benifit. When combined with the rest of Judge Haskell's comments it appears he used the term as part of his foundation for exercising his discretionary award of costs. That is fitting and proper to do.

SUMMARY COMMENT

The original problem, which gave rise to this case, camefrom a missapplication of perfectly good materials. The responsibility for that circumstance was the defendants.

The reason it went to litigation was the defendant's lack of applying good buiness practices to solve the problem

The reason it went expensive litigation in District Court was due to the defendant's misapplication of perfectly good legal procedures.

The reason it is in Supreme Court is because the defendant is still trying to avoid the consequences and costs of his actions of misapplications.

In the final analysis the defenses arguments to support its frivolous defence is as full of holes due to misapplication of legal procedures as the roof it installed by misapplying good materials.

The costs arising from the defense's acts of misapplication of resourses rightfully are the responsibility of the defense as the District Court decided and should remain so.

Sylvester A. Danz